No. 3769

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGUS, GRAB and ANTHONY KERR,
Appellants,
v.
THE WASHINGTON WATER POWER COMPANY, a corporation,
Appellee.

Upon appeal from the District Court of the United States for the District of Idaho, Northern Division

BRIEF OF APPELLEE

JOHN P. GRAY,
Coeur d'Alene, Idaho,
FRANK T. POST,
Spokane, Wash.,
Attorneys for Appellee.

Filed:.....Clerk

SHAW & BORDEN CO. 197226

INDEX

TABLE OF CASES

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGUS, GRAB and ANTHONY KERR, *Appellants,* *v.* THE WASHINGTON WATER POWER COMPANY, a corporation, *Appellee.*	No._____

BRIEF OF APPELLEE

STATEMENTS OF FACTS

The Washington Water Power Company is engaged in the generation and distribution of electricity in the States of Idaho and Washington.

Prior to the 7th of July, 1902, the power company filed an application with the Department of the Interior for a permit for a right of way across, and permission to construct and maintain an electric power transmission line, over and across the Coeur d'Alene

Indian Reservation. The application was made in pursuance of the provisions of the act of February 15, 1901 (31 Stats. at Large, 790), which act is as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park

> or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

Under date of July 7, 1902, the permission applied for was given by the Secretary of the Interior in accordance with the provisions of the act of Congress above referred to and the regulations thereunder.

At the time the permit was given, the lands over which the right of way was sought were a part of the Coeur d'Alene Indian reservation, unsurveyed and not open to settlement.

Pursuant to the permit, the Washington Water Power Company constructed over and across the reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Coeur d'Alene mining district, which line has ever since the month of August, 1903,

been used for the purpose of supplying electric power and energy to the Coeur d'Alene mining district.

At about the same time, the Washington Water Power Company filed an application with the Department of the Interior for authority to construct a telephone line over and across the Indian reservation under and pursuant to Section 3 of the act of Congress approved March 3, 1901, "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes." The right and authority to survey, locate and maintain that telephone line was granted by the Secretary of the Interior upon the payment of the damages and compensation assessed under his direction, amounting to the sum of $224, which was paid by the Water Power Company into the office of the Commissioner of Indian Affairs.

That telephone line is constructed upon the same poles as the electric power transmission line and is used in connection with and is incidental to the power transmission line.

For the purpose of constructing and maintaining the line, a patrol road was built during the years 1902 and 1903 along which the patrolmen of the Water Power Company pass in patrolling the line

and in keeping the same in repair and available for use.

After the construction of the power and telephone lines and the patrol road, and in 1906, Congress passed an act making provision for the allotment of lands to the members of the Coeur d'Alene tribe of Indians within the reservation, and the subsequent opening of the reservation to settlement.

In the year 1910, the appellants made homestead filings upon lands within the reservation over and across which the power and telephone lines had been constructed. The appellants subsequently made entry and received patents for said lands.

The appellants interfered with the employes of the Washington Water Power Company passing along and patrolling the said road and in various manners asserted their claim that the Water Power Company had no right to go along said right of way or upon the said lands for the purpose of repairing, maintaining or patrolling the line.

COMPLAINT

The Washington Water Power Company brought four several actions against the appellants seeking injunctions restraining the appellants from interfering with the Water Power Company in operating and maintaining the power transmission line, telephone line and patrol road, and praying that the court de-

cree that the permit and easement issued therefor were, and each of them was, in full force and effect and had not been annulled, revoked or modified by the homestead entries and patents issued to the appellants.

Jurisdiction was based upon the ground that the suits involved the construction and application of the act of February 15, 1901 (Chapter 372, 31 Stats. at Large, 790), being the act under which the permit for the power line was granted; the act of March 3, 1901 (31 Stats. at Large, 1083), the act under which the easement for the telephone line was granted, and the act of June 21, 1906 (34 Stats. at Large 335), the act opening the Coeur d'Alene Indian reservation, and also upon the ground that there was a diversity of citizenship.

The jurisdictional value was alleged, shown and not controverted.

THE ANSWERS

The answers raised many issues which were at the trial practically limited to one, namely, the question of whether or not the patents cancelled and revoked the rights theretofore granted by the government to the Washington Water Power Company to construct, maintain and operate its power transmission and telephone lines and patrol road.

The four cases were consolidated for trial and appeal, it appearing that the same question was involved in each of the cases.

THE FACTS

There was little controversy concerning the facts. The Washington Water Power Company showed that it had received the permit for the power transmission line and the easement for the telephone line, as alleged in the complaint; had constructed the same in the years 1902 and 1903, and had at all times since that date maintained the same, together with a patrol road along the line.

The plats of the two townships within which the lands of the appellants fall were introduced in evidence (Exhibits 1 and 2). It is shown by the plats, as well also by the testimony of the Receiver of the government Land Office, that the plats upon their face showed the power line across the townships. (R p. 55).

It was shown that the power line is constructed along the right of way granted by the Secretary of the Interior (Logan, R. pp. 59-60). The necessity for patrolling the line and the reasons therefor and the necessity for a patrol road along the line was shown by the testimony of John B. Fiskin (R. pp. 61 to 63), the testimony of LeRoy Hooper, a patrolman (R. pp. 64 to 66), and the testimony of A. H·

Beckwith (R. pp. 67 to 68). It was also shown that the road and pole line are in the same place where they were built in the years 1902 and 1903 by the testimony of E. S. Crane (R. pp. 68-9). Mr. Crane and Mr. Hooper also testified to the interference by fences and plowing with the use of the patrol road.

TESTIMONY FOR DEFENDANTS (APPELLANTS)

The defendants (appellants) each testified that they had entered upon the land and secured patents therefor and each of them admitted that the power line was constructd across his land when he first settled there.

Miller testified:

> "This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time." (R. p. 70.)

Appellant Swendig testified that it was across the land upon which he settled when he first settled there (R. p. 71).

Appellant Grab testified that when he settled on the land the power line ran across it (R. p. 72). So also did the appellant Kerr (R. p. 73).

THE APPELLANTS' CONTENTION

The appellants simply contend that the permits and

easements to the Water Power Company and its right to maintain and operate the line were revoked by the subsequent issuance of patents to appellants.

THE DECREE OF THE COURT

The trial court held otherwise and decreed:

(1) That the permit granted by the Secretary of the Interior under the act of February 15, 1901, for the electric power transmission line was a valid and subsisting permit and in full force and effect and that the Washington Water Power Company is in possession of the right of way and of the power transmission line constructed over and across the same;

(2) That the Washington Water Power Company is the owner of a right of way easement for a telephone line over the identical right of way for the electric power transmission line and that the telephone line as now constructed is incidental to the use of the power transmission line and said right of way easement is now in full force and effect;

(3) That the plaintiff is entitled to maintain along the transmission line and telephone line a roadway which must be within 50 feet of the center of said line as now constructed and the agents, servants and employes of the Water Power Company are entitled to go along the same at all times and keep and maintain the roadway for such purpose;

(4) That the plaintiff is further entitled in making

repairs or renewals to the use of such land within 50 feet of the center of said line as may be necessary therefor;

(5) That the title of the defendants is subject to the foregoing rights of the Water Power Company.

It was further decreed that if any of the defendants (appellants) maintains any fence or fences on, around or across the lands he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where the roadway passed through such fences, and the Water Power Company should furnish locks and keep the gates locked.

The court further enjoined the defendants (appellants) from interfering with the plaintiff in the maintenance and operation of said power line, telephone line and patrol road, or in making repairs or renewals.

It was decreed that the rights of the plaintiff (appellee) should be limited to the strip of land 50 feet on each side of the electric power transmission line and that subject to the plaintiff's (appellee's) reasonable needs, the defendants (appellants) should have the right to occupy and use the strip of land and the Water Power Company and its employes, in going along said road, should use reasonable care to do no

more injury to the defendants' growing crops than may be reasonably necessary, and must keep within 50 feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line, and that in making repairs or renewals reasonable care should be exercised not to do unnecessary damage to crops growing along the line. (R. pp. 75 to 80).

From that decree this appeal has been taken.

ARGUMENT

In compliance with the provisions of the acts of Congress above referred to, the Washington Water Power Company applied for and received a permit to construct a power line and an easement to construct along the power line a telephone line. At the time these rights were granted by the United States, the lands were unsurveyed lands within an Indian reservation.

Upon receiving the permit and easement, the Water Power Company expended a large sum of money in the construction of the power line from Spokane, Washington, to the Coeur d'Alene mining district, the section of the line across the reservation being only a part of the entire transmission line, but its use is essential to the maintenance of the service upon the entire line.

Notwithstanding the large investment in the construction of this line; notwithstanding that it serves a public use and was intended to serve a public use when the permit was granted and the line constructed, it is the contention of appellants that the subsequent surveying of the land and the patenting of it by the United States in itself revoked both the permit to construct and maintain the electric power transmission line and the easement to construct and maintain the telephone line.

The precise question was once before decided by Judge Dietrich in the case of

Washington Water Power Co. vs. Harbaugh,
253 Fed. 681

The Harbaugh case involved the same power transmission and telephone line over another tract of land. Discussing this precise question, Judge Dietrich in that opinion said:

> "It is not questioned by the defendant that the plaintiff duly procured a right of way for the maintenance of a telephone line, and a permit for the construction and maintenance of its power line, at the dates hereinbefore stated and pursuant to the provisions of the acts of Congress above cited. His contention is that the telephone line is a mere incident of the power line, and that for the transmission line the plaintiff never acquired anything more than a revocable license, and that the issuance of the patent *ipso*

facto operated to revoke the license. It seems clear that the right acquired for the telephone line was in the nature of an easement, and right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior. It is further true that the telephone line is a mere incident of the transmission line. Hence, the controlling question is whether the license or permit for the power line was revoked by the issuance of patent. In transactions between private individuals the general rule is that a conveyance of the land by the licensor operates to revoke the license, and all rights and privileges of the licensee terminate as of course. This principle, it seems, was for some time recognized by express rule of the Interior Department, as being applicable to licenses granted under the Act of February 15, 1901, but upon August 23, 1912, after consideration, the conclusion was reached by the Department that to effectuate the purpose of the statute, it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.' (Letter of August 23, 1912, to the Commissioner of the General Land Office, by Walter L. Fisher, Secretary of the Interior.) In discussing the question, among other things, the Honorable Secretary said: 'The rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of

such intent.' And again:—'In view of the permanent character of the works authorized to be constructed under the Act of February 15, 1901, and the large investment necessary to such construction, the statute ought not to be interpreted as giving a precarious tenure except insofar as clearly appears from the words used by Congress. After careful consideration of the matter, I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development, through the device of making permits revocable at his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that 'the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract,' was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permitee subject to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.' Accordingly, by express regulation, which was still in force at the time the defendant purchased the land and received his patent, it was provided that 'the final disposal by the United States of any tract traversed by a right of way permitted under the

said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.'

It is to be admitted that the language of the act does not put the intent of Congress beyond all doubt, but the reasoning of the Honorable Secretary as in part set forth in the foregoing extracts from his letter of August 23, 1912, is not without force, and besides, under a familiar rule, some weight is to be accorded to the practical construction given to a doubtful statute by a high administrative officer. The view is therefore, adopted that the issuance of the patent to the defendant did not revoke the plaintiff's license. It may be unfortunate, but it is not of controlling importance, that the patent did not contain a notation referring to the plaintiff's right of way, as required by the regulations of August 23, 1912. The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission. It is hardly possible to contend that the defendant was in any wise misled to his injury. Admittedly he knew that the plaintiff was maintaining and operating the transmis-

> sion line, and so far as appears he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that neither the integrity nor the extent of the plaintiff's right was affected by the issuance of the patent."

The court thereupon, in that case, further considered the question of the extent of the right to patrol and also to repair and reached the conclusion which he followed in the present case.

The decision of Judge Dietrich was in harmony with the construction which had been given to the statute by the Secretary of the Interior. Under date of August 23, 1912, the Secretary of the Interior in a letter to the Commissioner of the General Land Office held that:

> "To effectuate the purpose of the statute it is necessary that a permit once given (under the act referred to) should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute."

That decision of the Secretary of the Interior was introduced in evidence and for convenience is incorporated in the record as Plaintiff's Exhibit No. 14 (R. pp. 101 to 110).

The construction of statutes by executive departments charged with the duty of administering them

should not be overruled without cogent reasons, and a settled construction of such statutes by the officers of one of the great executive departments of the government should not be overruled unless it is clearly erroneous.

United States v. Moore, 95 U. S. 760.
Heath v. Wallace, 138 U. S. 573.

Such has always been the interpretation of the act of February 15, 1901, in so far as it affects permits granted within forest reserves. The administration of that act so far as it affected forest reserves was under the supervision of the Department of Agriculture. That such is the construction of that department is shown by the letter of Secretary Fisher of August 23, 1912.

In the case at bar, a motion was made to dismiss the complaints, but was overruled in a memorandum decision by Judge Dietrich, following the Harbaugh case (R. pp. 52-53).

It was maintained by counsel for appellants that a subsequent decision of the Secretary of the Interior in the case of one Nye dated April 28, 1921, overruled the previous construction of the law by the department. That ruling is found at pages 111 to 116 of the record.

Involved in the Nye case, was a permit to overflow certain lands within the Coeur d'Alene Indian

reservation, and the Secretary of the Interior, for reasons which he considered equitable and there set out, revoked that permit in so far as Nye and certain other entrymen were concerned, leaving it in force as to other entrymen.

It was urged upon the court below that under the decision of Secretary Fall, that where patents have been issued upon entries made prior to August 23, 1912, that such patent revoked the permit. Judge Dietrich, however, expressly held to the contrary. Judge Dietrich held that the remedy of the defendants (appellants) if any they had, is in an application to the Secretary of the Interior to revoke the permit for the transmission line across the lands patented to them rather than an application to the court. The decision of Judge Dietrich in this case is not contained in the record, but is attached to this brief as Appendix 1. Treating particularly of the decision of Secretary Fall, Judge Dietrich said:

> "I have read this recent decision of the Secretary of the Interior, and it must be clear, I think, that he does not intend to modify the ruling insofar as the ruling of August 24, 1912, was one of law. The decision would be inconsistent in itself if that view be taken; it would indicate a discrimination between two classes of settlers. If as a matter of law the patents which were issued upon entries made prior to August 24, 1912, conveyed the entire title free from the burden of this power line, then it would not be for the Secretary now to say that some of those patents or some of those titles shall be free from the incumbrance

and that others shall still continue to bear it. There would be no reason for discriminating or distinguishing between those who bought before and those who bought after August 24, 1912. As I understand, here, he revokes the permits and recalls the patents and promises to issue other patents only to certain holders of title upon entries which were made prior to August 24, 1912. But if, as is now contended as a matter of law, those settlers took the title regardless of what the Department may have undertaken to do, when asserting reservations in the patents, then of course any such attempted discrimination or distinction would be futile; they would all stand upon the same footing. It is quite clear, I think, from the fact that the Secretary refers to the status of the proceeding there to revoke the permit, the petition for rehearing or review, that he is really exercising here his discretion in favor of certain settlers who make a strong equitable appeal. In that view of course the remedy of these defendants is an application to the Secretary of the Interior rather than to the court. The court is bound by the legal status of the title. It seems to be admitted by counsel for the plaintiff that it is within the discretion of the Secretary of the Interior to revoke these permits. However that may be, they would apparently have the same right to make an appeal to the Secretary of the Interior that the settlers on the flooded lands had, in the case which has been called to our attention. Clearly, however, this court hasn't any power to exercise such discretion. Either the permit is valid as a matter of law, and subsisting, or it was terminated by the issuance of patent.

"I think I shall take the same view, gentlemen, that I have heretofore taken. The relief

> prayed for will be granted. Decree substantially in the form entered in the Harbaugh case will be entered. As I remember, the decree was somewhat guarded so as not to work unnecessary injury to the farmers."

THE FORM OF THE PATENT.

The patents to all of the lands were issued subsequent to the decision of the Secretary of the Interior of August 23, 1912, but the patents did not expressly except the right of way for the power transmission line and telephone line. As Judge Dietrich said in the Harbaugh case:

> "The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations, it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission."

The issuance of a patent is a mere ministerial act, and if it be issued for lands reserved from sale by law it is void.

Stoddard v. Chambers, 2 Howard, 284.

That the patent contains no express reservation of a right of way is of no consequence.

Jamestown & Northern R. Co. v. Jones, 177 U. S. 125.

Smith v. Townsend, 148 U. S. 490.

Construing the act of March 3, 1891, the Interior Department held that an easement attaching to public lands by the construction of a reservoir and canals upon a right of way acquired thereunder does not, upon acquisition of such irrigation system by the United States for use in connection with a project under the reclamation act, become extinguished by merger in the estate of the government, and that entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by the storage of waters in the reservoir.

McMillan Reservoir Site, 37 L. D. 6.

That case is precisely in point with the case here with the single exception that in the case at bar the right acquired under the act of February 15, 1901, is a permit which is revokable by the Secretary of the Interior, whereas in the other case it is called an easement.

The act of June 21, 1906, opening the Coeur d'Alene Indian reservation is not inconsistent with or repugnant to the act of February 15, 1901. It has been contended that the issuance of the patent itself was a revocation of the permit. The Secretary of the Interior discusses and disposes of this in the

decision and letter of August 23, 1912. It is also discussed and passed upon by Judge Dietrich in the decision in the Harbaugh case. The two acts are not inconsistent. In

State v. Stoll, 17 Wallace, 425-431

this principle is laid down:

> "It must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

And such also has been the view adopted in the construction of other statutes by the Land Department. The doctrine of the department is well stated by Secretary Noble in

In re Annie Knaggs, 9 L. D. 49

as follows:

> "Statutes are repealed by express provisions of a subsequent law, or by necessary implication, and in the latter case there must be such a positive repugnancy between the provisions of the old and new law that they cannot stand together, or be consistently reconciled. Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable, and it is a question of construction whether or not an act professing to repeal or interfere with the provisions of a former law operates as a total, or

> partial, or temporary repeal; and if there are two acts seemingly repugnant, if there is no clause of repeal in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication."

The object of the act of February 15, 1901, was to foster the development of the resources of the country by the generation and distribution of electric power and by the promotion of irrigation, mining, manufacturing, supplying of water for any beneficial use and many other legitimate commercial purposes. Manifestly, it was not intended by Congress that when a permit had been granted by the Secretary of the Interior under the act, such permit should be revoked, except when there was a just and substantial reason therefor and such as was recognizable in a court of equity. Large investments necessarily were to be made under such permits, and it is not reasonable to believe that it was the intention of Congress that when a permit was issued for such a right of way over an Indian reservation, thereafter the mere opening of the Indian reservation to selection, allotment and entry would or should result in a revocation of the permit. Had any such intention been expressed in the act, it is clear that no such large investments would ever have been made. The act was intended to encourage development and not to make it hazardous.

The power of revocation was retained in the department in order that certain governmental control

might be exercised in harmony with a growing sentiment that some such control should be retained. There is nothing to indicate that the Secretary of the Interior has ever, in the exercise of his discretion or at all, revoked or intended to revoke the permit of the Washington Water Power Company.

THE PATROL ROAD.

It is urged that the grant of a right of way for the construction and maintenance of a high tension power line does not carry with it the right to use a patrol road along the line. That the road is necessary in the construction of the line must of course be conceded. The evidence shows without contradiction that the maintenance of the road along the line is essential, first, for the purpose of patrolling the road, and second, for the purpose of making any repairs or replacements that may be necessary. It is just as essential to the useful development of the resources of the country that the means of use be maintained as it is that means of use be constructed. Certainly, it was within the intent of Congress in granting such right of way for electric power transmission lines as a necessary incident thereto to grant the right to go along the line, patrol it and maintain it. No other reasonable conclusion can be arrived at either from the language of the statute or an understanding of the reasons which impelled its enactment.

Moreover, it grants a right of way 100 feet in

width. Such grant must have been for the purpose of conveying the right, not alone to construct, but the right to maintain. A way along the pole line for the employes to pass in patrolling, repairing and replacing it is one of the essential elements to its beneficial use.

To contend that nothing but the bare land upon which the poles stand is granted, is an endeavor to narrow and limit the grant of the right of way beyond all reason. In

Illinois Cent. R. Co. v. Taylor, 177 S. W. 293

it was held:

> "Where a railroad company was entitled to a right of way over lands, the 'right of way' includes not only the land immediately beneath the tracks, switches, and buildings used in the operation of the road, but such portions as, in addition, are necessary to the use of the tracks and buildings."

Upon the original hearing of the above case found in the 175 S. W. 26 on page 28, the court discusses the case of

Joy v. St. Louis, 138 U. S. 1-44

and says:

> "A reading of the opinion in *Joy v. St. Louis* makes it very plain that the court did not intend by its language to restrict the 'right of way', as applied to a railroad company, to its tracks or roadbed."

While the question under consideration was a very different one, there is language in the case of

Chicago, M. & St. P. R. Co. v. Cass County, (N. D.) 76 N. W. 239-241

which is applicable here:

> "The services which the public expect and demand from the railroad companies constantly grow more onerous. It would, indeed, be a mistaken policy, in our rapidly developing state, to curtail any of the agencies which tend to render this service efficient. We hold, then, that the right of way of a railroad company, or, using the constitutional phraseology, the 'roadway' of a railroad company, includes, not only the strip of ground upon which the main line is constructed, but all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects of their incorporation."

The grant of a right of way must be construed reasonably and in the light of surrounding circumstances so as to ascertain the intent of the parties.

The appellee was granted a permit to construct this line in accordance with the laws of the United States. That permit has never been revoked. Public policy would seem to demand that an investment such as is required in a case of this kind was not intended by Congress to be as hazardous as the contention of appellants would make it in this case.

We submit that the judgment and decision of the court below should be affirmed.

Respectfully submitted,

JOHN P. GRAY,
FRANK T. POST,
Attorneys for Appellee.

APPENDIX 1.

In the District Court of the United States for the District of Idaho, Northern Division

WASHINGTON WATER POWER COMPANY, a corporation,
Plaintiff,
v.
JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB and TONY KERR,
Defendants.
} **Dicision.**

There is very little to be said in addition to what I have already tried to say upon the general questions which have been submitted. I am not without appreciation of the points argued by Judge Ailshie and by counsel in the other case, that ordinarily in case of private licenses or licenses given as between private persons, the disposition of the property by the licensor terminates the license. There are exceptions to that rule, but it is recognized as a general rule. I read these patents to the defendants in this case the same as if a reservation of this right of way were contained therein, or this permit or license, whatever it may be called. It is true the patents themselves do not contain in terms such a reservation, but at the

time they were issued there was this general regulation of the Secretary of the Interior that all patents thereafter issued,—and these patents were subsequently issued,—shall be subject to the right of way for this power line, and hence it cannot be successfully contended that it was the intention of the Land Department to issue the patents free from this burden of the power line. I have felt that while the question is a close one, it is rather a question of the power of the Land Department and that what it actually undertook to do; it actually undertook to reserve this right of way, or to at least hold within its power the discretion either to continue the permit or to revoke it. Now whether it had that power under the statute is another question, a close one, it may be admitted; but that question was considered both in the Harbaugh case and upon the demurrers in these cases, and I am not inclined now to recede from the conclusion already reached.

I have read this recent decision of the Secretary of the Interior, and it must be clear, I think, that he does not intend to modify the ruling insofar as the ruling of August 24, 1912, was one of law. The decision would be inconsistent in itself if that view be taken; it would indicate a discrimination between two classes of settlers. If as a matter of law the patents which were issued upon entries made prior to August 24, 1912, conveyed the entire title free from the burden of this power line, then it would not be

for the Secretary now to say that some of those patents or some of those titles shall be free from the incumbrance and that others shall still continue to bear it. There would be no reason for discriminating or distinguishing between those who bought before and those who bought after August 24, 1912. As I understand, here, he revokes the permits and recalls the patents and promises to issue other patents only to certain holders of title upon entries which were made prior to August 24, 1912. But if, as is now contended, as a matter of law, those settlers took the title regardless of what the Department may have undertaken to do, when asserting reservations in the patents, then of course any such attempted discrimination or distinction would be futile; they would all stand upon the same footing. It is quite clear, I think, from the fact that the Secretary refers to the status of the proceeding there to revoke the permit, the petition for rehearing or review, that he is really exercising here his discretion in favor of certain settlers who make a strong equitable appeal. In that view of course the remedy of these defendants is an application to the Secretary of the Interior rather than to the court. The court is bound by the legal status of the title. It seems to be admitted by counsel for the plaintiff that it is within the discretion of the Secretary of the Interior to revoke these permits. However that may be, they would apparently have the same right to make an appeal to the Secretary of the

Interior that the settlers on the flooded lands had, in the case which has been called to our attention. Clearly, however, this court hasn't any power to exercise such discretion. Either the permit is valid as a matter of law, and subsisting, or it was terminated by the issuance of patent.

I think I shall take the same view, gentlemen, that I have heretofore taken. The relief prayed for will be granted. Decree substantially in the form entered in the Harbaugh case will be entered. As I remember, the decree was somewhat guarded so as not to work unnecessary injury to the farmers.